

2005 FEB 28 A 11:00

E. JEROME MALRY,
Complainant
V.

PEOPLES ENERGY CORPORATION,
Respondent.

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CHIEF CLERK'S OFFICE

04-0577

**PEOPLES ENERGY CORPORATION'S REPLY IN OPPOSITION TO
COMPLAINANT'S LIST OF EXCEPTIONS TO THE
PROPOSED ORDER OF FEBRUARY 1, 2005**

NOW COMES Peoples Energy Corporation ("Peoples Energy"), by and through its counsel, McGuireWoods LLP and pursuant to Section 200.830 of the Illinois Administrative Code files its Reply In Opposition to Complainant's List of Exceptions to the Proposed Order of February 1, 2005. In support of its reply, Peoples Energy states as follows:

1. Peoples Energy objects to Complainant's Exception 1. The record clearly reflects, as evidenced by a date-stamped copy of the Complaint, that Malry filed his Complaint on September 13, 2004. See copy of Complaint 04-0577 attached hereto as Exhibit A. No evidence to the contrary was introduced at the hearing and accordingly the Judge's ruling should stand.
2. Peoples Energy objects to Complainant's Exceptions 2 through 4. In these exceptions, Complainant argues that the Commission cannot rule on Peoples Energy's Motion to Dismiss because Peoples Energy filed an answer to the Complaint denying all allegations. As is par for the course for Complainant, he once again misstates applicable law. See Argument in Support of Peoples Energy's Objection *infra*.

3. Peoples Energy objects to Exception 5. Peoples Energy, the only party named in the Complaint, responded to the Complaint. Accordingly, Peoples Energy agrees with Complainant's statement that "it is obvious that the correct party responded to the pleading." Further, Peoples Energy has no objection to Complainant's request to have this Commission explain the circumstances surrounding the dismissal of each of his thirteen previously filed complaints in any final order issued.

ARGUMENT

On September 13, 2004, Complainant filed two complaints against Peoples Energy. At the initial hearing held on September 28, 2004, Peoples Energy argued that the case should be dismissed and offered a variety of reasons supporting dismissal. Complainant's counsel specifically requested that any motion to dismiss be brought in writing so that she could be afforded the opportunity to prepare a response. Tr. p.13 at ¶ 5-8. In complying with Ms. Triplett's request, Judge Brodsky ordered Peoples Energy to file an answer and/or any other pleading. Tr. p. 14 at ¶ 14-17. Peoples Energy complied and filed an answer in which Peoples Energy denied all allegations. Peoples Energy then filed a Motion to Dismiss arguing that the Commission lacked subject matter jurisdiction to adjudicate the matter before it because Peoples Energy was a holding company and not a public utility.

Despite the fact that a written motion was filed upon Complainant's request, Complainant failed to respond to Peoples Energy's Motion to Dismiss. He failed to move to strike the Motion as improper and failed to amend his Complaint to name a proper party which the Commission could exercise jurisdiction over.

Now Complainant argues that “Peoples Gas Light and Coke Company, have [sic] forfeited any right to . . . argue that an improper party has been named.” Complainant’s Argument at 2. In support of this position Complainant states that “Peoples Gas Light and Coke Company forfeited this argument by answering the Complainant’s complaint . . .” and by failing to raise these arguments throughout these proceedings while being represented by competent legal counsel.” Id.

Complainant’s argument fails for two reasons. First, his entire argument is predicated on the erroneous position that “clearly by its answer to the complaint [sic], Peoples Gas Light and Coke has acknowledged that it is the intended defendant” First, Peoples Gas is not a party to these proceedings and never responded in any form to Complainant’s complaint. Complainant filed his complaint against Peoples Energy, not Peoples Gas, and as such brought a complaint that this Commission has no jurisdiction to adjudicate. Labeling his captions as Malry v. Peoples Gas, Light and Coke Company and calling Peoples Gas the “Respondent” throughout his Brief on Exception does not change this fact.¹

Second, Complainant ignores that the Commission has no jurisdiction to hear matters against Peoples Energy. What Complainant refers to as a “hyper-technical argument” is a fundamental cornerstone of civil procedure, namely that the adjudicatory body, be it a court or an administrative agency vested with adjudicatory powers, must

¹ Interestingly, Complainant’s own exhibits support Peoples Energy’s position. While Complainant argues that Peoples Gas “answered a complaint and defended the case” the answer attached in support of this proposition clearly shows that it was filed on behalf of Peoples Energy. Also, Complainant concedes that Peoples Energy was the named Respondent by asking the Commission to amend the Complaint to name Peoples Gas. As Complainant has failed to take the appropriate steps to amend a complaint, namely filing a written motion asking for leave, Peoples Energy requests that this Commission strike Complainant’s request.

have jurisdiction over the parties and the subject matter presented in a complaint.

Without jurisdiction, the action simply cannot proceed.

“Jurisdiction of the Commission is derivative in nature, in that it only has jurisdiction over matters that are expressly defined in the Public Utilities Act.” Perkins v. AT & T of Illinois & PRC, 00-0105, ICC, 2001 WL 1771366 (Dec. 5, 2001). The Illinois Public Utilities Act vests the Commission with jurisdiction only over public utilities. 220 ILCS 5/4-101 (2004). “Public utilities” is defined in Section 3-105 of the Act. 220 ILCS 5/3-105 (2004).

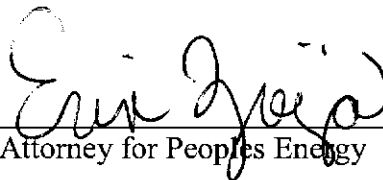
Complainant brought his complaint against Peoples Energy. It is well-recognized that Peoples Energy is a private holding company and not a public utility. Peoples Energy Corporation v. Illinois Commerce Comm’n, 142 Ill. App. 3d 917 (1st Dist. 1986). Because Peoples Energy is not a public utility, the Commission lacks jurisdiction to adjudicate claims brought against it. Id.

The fact that Peoples Energy filed an answer to the complaint does not vest the Commission with the necessary jurisdiction to adjudicate the matter. “An absence of subject matter jurisdiction cannot be waived by the parties, and may be raised by court[s] *sua sponte*. People v. Capital News, Inc., 137 Ill.2d 162, 170 (Ill. 1990).

In any event, Complainant’s argument is unsupported by law and ignores that the Commission has previously exercised its right to rule on a motion to dismiss brought after an answer was filed. In DePauw v. Geneseo Tele. Co., 03-0132, ICC, 2003 WL 23329315 (Nov. 6, 2003), Complainants filed a complaint against Geneseo seeking reparations. In response, Geneseo filed an answer and a motion to dismiss. In its motion to dismiss, Geneseo argued that the complaint was barred by the statute of limitations.

Complainant filed a response to the motion to dismiss as well as filed responses to the affirmative defenses presented in Geneseo's answer. The Commission granted the motion to dismiss, in part, and then proceeded to adjudicate the remaining claims. In light of the Commission's position in Geneseo, and in light of the fact that Complainant presented no authority for his proposition that the Commission cannot rule on the Motion to Dismiss, this Court should deny Complainant's Exceptions in their entirety.

RESPECTFULLY SUBMITTED
PEOPLES ENERGY CORPORATION

By: 
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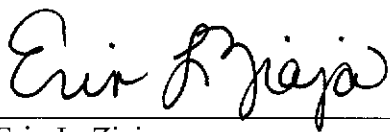
**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

E. Jerome Malry,)	
)	Docket No. 04-0577
Complaint as to Improper Servicing)	
Account, Request for Audit and)	
Investigation, in Chicago, Illinois.)	

NOTICE OF FILING

To: Ms. Rosemary Triplett
Attorney at Law
P.O. Box 23501
Chicago, IL 60623

PLEASE TAKE NOTICE that on February 25, 2005, we filed with the Clerk of the Illinois Commerce Commission, Peoples Energy Corporation's Reply in Opposition to Complainant's List of Exceptions to the Proposed Order of February 1, 2005, a copy of which is served upon you by U.S. Mail on the date of filing.



Erin L. Ziaja

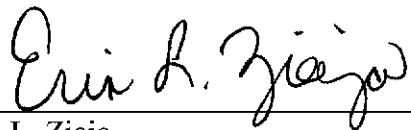
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CERTIFICATE OF SERVICE

I, Erin L. Ziaja, an attorney, certify that I caused a copy of the foregoing Peoples Energy Corporation's Reply in Opposition to Complainant's List of Exceptions to the Proposed Order of February 1, 2005, to be served upon

Ms. Rosemary Triplett
Attorney at Law
P.O. Box 23501
Chicago, IL 60623

By U.S. Mail on February 25, 2005, before the hour of 5:00 P.M.



Erin L. Ziaja